No. 90-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHEVRON CORPORATION, *et al.*,
Petitioners,

v.

STATE OF ARIZONA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE AMERICAN ADVERTISING FEDERATION, INC., IN SUPPORT OF PETITIONERS

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May 8, 1991

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MOTION OF THE AMERICAN ADVERTISING FEDERATION, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Advertising Federation, Inc. ("AAF") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of the petitioners herein.*

The purpose of this brief is to call to the Court's attention an important issue not briefed by the petitioners: the significant chilling impact the opinion below will have on lawful commercial speech. The court below acknowledged that parallel pricing is lawful. Yet it held that where parallel pricing is accompanied by the public dissemination of price information—a form of commercial speech that is commonly carried out through advertising—the firm engaged in such public dissemination will be exposed to an antitrust jury trial over whether its paral-

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* Counsel for the AAF has contacted counsel for all parties to seek their consent to the filing of this *amicus curiae* brief. Counsel for the State of Arizona withheld such consent.

lel pricing decisions were the product of a conspiracy with its competitors. This decision will inhibit firms from disseminating price information to the marketplace through advertising. The court below ignored both the procompetitive benefits that flow from such advertising and the constitutional protection accorded to commercial speech. And because practical realities make it impossible to conduct a national advertising campaign in a way that is insulated from antitrust scrutiny by federal courts within the Ninth Circuit, the inhibitions imposed by this decision on price advertising will be felt nationwide.

The AAF has an interest in the uninhibited flow of the affected commercial speech. The AAF is a national trade association encompassing all elements of the advertising industry, including as members companies that produce and advertise consumer products; advertising agencies; magazine and newspaper publishers; radio and television broadcasters; radio and television networks; outdoor advertising organizations; and other media. Its membership also includes twenty-one national trade associations; over two hundred local advertising clubs, with 52,000 members; and over two hundred college chapters, with 6,000 student members. The AAF and its members therefore have a direct and long-standing interest in preserving the free flow of advertising and commercial speech.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE AMERICAN ADVERTISING FEDERATION, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The interest of amicus curiae appears in the accompanying motion.

SUMMARY OF ARGUMENT

In *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court confirmed that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588. Parallel pricing is both lawful and commonplace. As this Court has long recognized, such conduct alone cannot give rise to any inference of a price-fixing conspiracy. The public dissemination of price information is also lawful

and commonplace. Yet the court of appeals below held that if the public announcement of wholesale gasoline prices by oil companies is accompanied by parallel pricing, the simultaneous presence of these two lawful activities is sufficient to permit a jury to infer the existence of an unlawful price-fixing conspiracy. This decision is likely to have a serious adverse impact on advertising and commercial speech, which may be felt far beyond the factual context in which this case arose.

Advertisements of prices are analytically indistinguishable from the public price announcements that the court of appeals in this case held could support an inference of conspiracy under *Matsushita*. The decision of the court below threatens to have a profound chilling effect on lawful, beneficial advertising by threatening firms that would run such advertising with the prospect of treble damage litigation under the antitrust laws. Most advertisers will drop the price advertisements rather than gamble over whether a jury will conclude mistakenly that such businesses were participants in an antitrust conspiracy.

In addition, the decision completely ignores the constitutional protections that commercial speech enjoys. It is simply untenable to conclude, as the lower court does, that truthful commercial speech (such as a price announcement) serves no beneficial purpose. The ramifications of the decision below are of such seriousness that this Court should grant certiorari. The decision of the court of appeals is clearly wrong, and it should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS LIKELY TO HAVE A BROAD CHILLING EFFECT ON PRICE ADVERTISING

Under the antitrust laws, a jury is not free to speculate that ostensibly lawful conduct may actually have been undertaken pursuant to conspiracy. As this Court clearly stated in *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), "antitrust law limits the range of permissible inferences from ambiguous evidence." *Id.* at 588. Nevertheless, the court of appeals in this case held that one lawful act—the dissemination of wholesale prices through press releases—may give rise to an inference of a price-fixing conspiracy when viewed in conjunction with another lawful act—parallel pricing.

Logically, if the antitrust laws permit an inference of conspiracy to be drawn from announcements of prices through press releases (as the court below held), then the same inferences also could be drawn from price announcements through paid advertising. No tenable legal distinction can be drawn between a situation in which prices are made public by disclosure to trade journal reporters and a situation in which prices are made public through paid advertising. Thus, unless the decision below is reversed by this Court, AAF members and others who place advertisements containing price information will run the risk that such advertisements may be considered evidence of unlawful price-fixing conspiracies. Advertisers have traditionally been wary of any type of advertising that may create legal liabilities, and as a general matter, advertisers seek to steer clear of such advertisements. The decision of the court of appeals in this case therefore is likely to have a significant deterrent effect on the placement of advertisements containing price information.

Notably, the decision below stands in sharp contrast to a number of decisions by other courts, which have

refused to permit an inference of a price-fixing conspiracy to be drawn from public dissemination of price information. *See, e.g., Universal Lite Distributors, Inc.* v. *Northwest Industries, Inc.*, 452 F. Supp. 1206, 1217 (D. Md. 1978), *aff'd in relevant part*, 602 F.2d 1173 (4th Cir. 1979) ("this Court cannot conclude that public or advance announcements of price changes . . . amounted to any violation of the antitrust laws"); *United States* v. *General Motors Corp.*, 1974-2 Trade Cas. (CCH) ¶ 75,253 at 97,671 (E.D. Mich. 1974) ("[t]he public announcement of a pricing decision cannot be twisted into an invitation or signal to conspire; it is instead an economic reality to which all other competitors must react").

The chilling effects of the court of appeals' decision will not, however, be limited to the Ninth Circuit. Rather, the impact of this decision upon advertisers is likely to be felt nationwide. Advertising campaigns are frequently national in scope, and such national campaigns must adhere to the most restrictive legal regulation that is applicable in any local market. It simply would not be feasible for a seller who runs price advertisements on a national scale to delete the price information from those advertisements appearing within the geographic boundaries of the Ninth Circuit. If price advertisements that appear within the boundaries of the Ninth Circuit give rise to unacceptable legal risks, the likely response of advertisers will be to omit the advertisements everywhere.

Moreover, even if it were feasible for an advertiser to limit the geographic scope of its price-related advertising —and to refrain entirely from placing price advertisements in the Ninth Circuit—the risks imposed by the court of appeals' decision would not be avoided. Even if price advertisements are not run within the Ninth Circuit, competitors within the Ninth Circuit can still read, view or hear these advertisements. If a price-fixing suit is then brought within the Ninth Circuit, it will be governed by the erroneous construction of *Matsushita* set forth by the court of appeals in this case.

Deterring the publication of advertisements containing price information will not advance the goals of the antitrust laws. As a general matter, the more participants in the market know about price levels, the more competitive the market will be. Indeed, the Federal Trade Commission has stated that "[a]dvertising . . . performs an indispensable function in the allocation of resources in a free enterprise system." *F.T.C.* v. *American Medical Ass'n*, 94 F.T.C. 701, 1005 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

The court below evidently recognized the value of price information at the retail level where individual consumers make their buying decisions. It therefore added to its opinion a cryptic footnote distinguishing between the dissemination of *retail* price information on the one hand and the dissemination of *wholesale* price information on the other hand. *See* 906 F.2d at 448 n.14. According to the court of appeals, an inference of conspiracy could properly be drawn from the public announcements of *wholesale* prices in a case like this one, because such an inference would not "significantly deter important legitimate conduct." *Id.* at 448. Yet, according to the court, an inference of conspiracy might not be permissible where *retail* prices are publicly announced, because retail price announcements may serve a legitimate function—*i.e.*, enabling "retail consumers to get the information they need to make efficient market decisions." *Id.* at 448 n.14. This attempted distinction does not, however, eliminate the pernicious consequences of the court of appeals' opinion.

First, the court of appeals' opinion will have anticompetitive consequences even if its chilling effect is confined to advertisements involving purely wholesale prices. Contrary to the court of appeals' assumption, public dissemination of wholesale price information serves legitimate competitive goals. In many industries, wholesalers compete actively to get retailers to carry their products,

and wholesale prices are an important element of the competition. Retailers often buy goods from a variety of wholesalers and need price information from the competing wholesalers to make market decisions. Any deterrent to wholesale price advertising would have significant anticompetitive effects on such industries.

Furthermore, the court of appeals was simply wrong in concluding that wholesale pricing information serves no legitimate function in markets where franchising is common, such as the gasoline industry. Such markets are often characterized by significant competition among suppliers for the continued allegiance of their franchised dealers. Franchise arrangements rarely last forever; dealers initiate and terminate franchise arrangements and dealers seeking new franchise relationships enter the market. Wholesale price information may be highly relevant to franchised dealers deciding whether to seek a new franchise relationship. Thus, the sweeping deterrent to wholesale price advertising imposed by the opinion below can only have a negative impact upon competition in such markets.

Second, the opinion below is likely to deter a common form of price advertising that does not fall neatly within either the wholesale or the retail category—*i.e.*, advertising by manufacturers of "suggested" retail prices, which may or may not reflect actual retail prices. Enterprising antitrust plaintiffs will argue that wholesale prices can be calculated with reasonable accuracy from suggested retail prices, and that advertisements of suggested retail prices are therefore the functional equivalent of wholesale price announcements. Because such price advertising may be used as evidence of a conspiracy under the decision below, cautious manufacturers will refrain from such advertising. Yet the procompetitive benefits of such advertisements are obvious. They tell consumers the price the manufacturer believes the dealer can sell at and still realize a fair profit. Armed with that information, the consumer can bypass the price-

gouging retailer who tries to charge more than the suggested retail price, or can use the suggested retail price as a benchmark from which to negotiate discounts.

Finally, even with regard to advertisements of purely retail prices, the court of appeals' opinion provides no real assurance that sellers will not have to try before a jury the issue of whether they published such advertisements as part of an unlawful conspiracy. Under the court's reading of *Matsushita*, an inference of conspiracy may be drawn from conduct so long as the inference would not "pose a significant deterrent to beneficial procompetitive behavior." *Id.* at 440. In certain industries or under the facts of particular cases, some courts might decide that retail price advertising does *not* constitute significant "procompetitive behavior," and thus may be relied upon by a plaintiff to support an inference of conspiracy. Again, AAF members are left to speculate as to the legal risks of engaging in price advertising under such circumstances.

In sum, the court of appeals' decision means that price advertisements in theory are lawful, but in practice may simply be too risky to utilize. The court's purported distinction between the dissemination of wholesale price information and the dissemination of retail price information will not realistically limit the chilling impact of this decision. The decision places a substantial burden on price advertising, and unless reversed it will surely damage the free flow of information necessary to the proper functioning of many competitive markets.

II. A COURT SHOULD NOT PERMIT AN INFERENCE OF CONSPIRACY TO BE DRAWN FROM EVIDENCE OF CONSTITUTIONALLY-PROTECTED COMMERCIAL SPEECH

There is another problem of constitutional dimensions raised by this decision, which was completely ignored by the court of appeals. As previously noted, this Court has made it very clear that mere parallel pricing by competi-

tors does not, in and of itself, constitute grounds for inferring the existence of a price-fixing conspiracy. *E.g.*, *Theater Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954). The court below did not disagree; it conceded that "[s]imple interdependent pricing does not violate the Sherman Act." 906 F.2d at 448. Yet the court of appeals ruled that parallel pricing *could* be held to violate the Sherman Act if it were to occur in conjunction with public price announcements. In short, sellers engaging in lawful parallel pricing may be judged to be antitrust violators merely because these sellers also engaged in a lawful form of commercial speech —*i.e.*, dissemination of price information.

There can be no doubt that dissemination of price information—whether by means of press releases or advertisements—constitutes a form of commercial speech. *See, e.g., Central Hudson Gas & Elec. Corp.* v. *Public Service Commission of New York*, 447 U.S. 557, 580 (1980) (Stevens, J.) (commercial speech includes "a manufacturer's publication of a price list"); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976) (commercial speech includes dissemination of price information). Because the uncensored flow of information is as important to a free market economy as it is to a political democracy, this Court has given significant First Amendment protection to commercial speech during the past two decades.[1] It

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[1] *E.g., Peel* v. *Attorney Registration and Disciplinary Commission of New York*, —— U.S. ——, 110 S. Ct. 2281 (1990); *Board of Trustees* v. *Fox*, 492 U.S. 469, 109 S. Ct. 3028 (1989); *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916 (1988); *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980); *Friedman* v. *Rogers*, 440 U.S. 1 (1979); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Carey* v. *Population Services International*, 431 U.S. 678 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431

is now well established that "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment." *Peel* v. *Attorney Registration and Disciplinary Commission of New York*, —— U.S. ——, 110 S. Ct. 2281, 2287 (1990) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

Admittedly, a person who violates the antitrust laws cannot seek refuge behind the First Amendment by contending that his unlawful conduct involved elements of free speech. Thus, the fact that a boycott may involve elements of free speech does not insulate such conduct from the proscriptions of the antitrust laws. *See, e.g.*, *F.T.C.* v. *Superior Court Trial Lawyers Ass'n*, —— U.S. ——, 110 S. Ct. 768, 779 (1990). Likewise, there is no question that an *agreement* to fix prices violates the antitrust laws, despite the fact that the agreement itself might involve some form of speech.

But this case involves an entirely different situation. The form of speech at issue—dissemination of price information—is *not* itself unlawful. Price dissemination does not violate the Sherman Act. As this Court has stated, "advance price announcements are perfectly lawful." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980); *cf. United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975) (mere "dissemination of price information is not itself a *per se* violation" of the antitrust laws). The court of appeals did not suggest—and could not suggest—that the defendants' announcements of prices in this case were in and of themselves untruthful or a violation of any law.

In sum, according to the decision below, conduct which is indisputably lawful (*i.e.*, parallel pricing) may be found by a jury to violate the antitrust laws, simply because the defendants also engaged in lawful, truthful acts of commercial speech. This ruling should not be

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U.S. 85 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

allowed to stand. By authorizing an inference of conspiracy to be drawn simply because the defendants engaged in lawful parallel pricing and lawful price announcements, the court below has placed a substantial and unwarranted burden on the exercise of a constitutional right.

The court of appeals inexplicably gave no consideration whatever to the First Amendment implications of its decision, and it made no effort to assess the burdens it was placing on free speech. This Court should not endorse the court of appeals' cavalier disregard of legitimate commercial speech issues in determining what inferences are permissible under *Matsushita*.

CONCLUSION

For the foregoing reasons, amicus curiae American Advertising Federation, Inc. respectfully submits that the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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